

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

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4 IN RE:

5 AIR CARGO SHIPPING SERVICES  
6 ANTITRUST LITIGATION : 06-MD-01775

7 - - - - -X

8 U.S. Courthouse  
9 Brooklyn, New York

10 Conference

11 December 19, 2011  
12 2:30 p.m.

13 BEFORE: HONORABLE VIKTOR V. POHORELSKY  
14 United States Magistrate Judge

15  
16 Court Reporter: ALLAN R. SHERMAN, CSR, RPR  
17 Official Court Reporter  
18 225 Cadman Plaza East  
19 Brooklyn, New York 11201  
20 Tel (718) 613-2529 Fax (718) 613-2630  
21 asher99983@aol.com

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1 A-P-P-E-A-R-A-N-C-E-S:

2  
3 For the Plaintiff: LEVIN, FISHBEIN, SEDRAN  
4 Berman  
5 510 Walnut Street  
6 Suite 500  
7 Philadelphia, PA 19106-3697  
8 BY: HOWARD J. SEDRAN  
9 HSEDRAN@LFSBLAW.COM

10 For the Plaintiff: LABATON SUCHAROW & RUDOFF, LLP  
11 100 Park Avenue  
12 New York, New York 10017  
13 BY: GREG ASCIOLLA, ESQ.

14  
15 For the Plaintiff: KAPLAN FOX & KILSHEIMER, LLP  
16 805 Third Avenue  
17 New York, New York 10022  
18 BY: ROBERT N. KAPLAN, ESQ.  
19 GREGORY K. ARENSON  
20 GARY L. SPECKS, ESQ.

1 APPEARANCES: (Continued)

2 DEFENDANTS:

3 For Korean PAUL HASTINGS, LLP  
4 Air 75 East 55th Street  
5 New York, N.Y. 10022  
6 BY: KEVIN C. LOGUE, ESQ.

7 For the Defendant: LATHAM & WATKINS, LLP  
8 Singapore Air 555 Eleventh Street, N.W.  
9 Singapore Air Suite 1000  
10 Cargo Washington, D.C. 20004  
11 BY: WILLIAM R. SHERMAN, ESQ.

12 For the Defendant: HOGAN LOVELLS U.S., L.L.P.  
13 Air Canada 555 Thirteenth Street, NW  
14 AC Cargo Washington, DC 20004  
15 BY: ASHLEY ANTLE, ESQ.

16 For the Defendant: DLA PIPER, LLP  
17 Cathay Pacific 1200 Nineteenth Street, NW  
18 Washington, DC 20036  
19 BY: DEANA L. CAIRO, ESQ.  
20 DAVID H. BAMBERGER, ESQ.

21 For EVA Airways  
22 KIRKLAND & ELLIS  
23 BY: KATE WHEATON, ESQ.  
24  
25

1 APPEARANCES: (Continued)

2  
3 DEFENDANTS:

4 For Asiana Airlines

5 O'MELVANEY & MYERS  
6 BY: ANGELA WILKS, ESQ.  
7 BEN BRADSHAW, ESQ.

8 For China Airlines

9 SQUIRE SANDERS, LLP  
10 BY: JAMES DICK, ESQ.

11  
12 For Air India

13 RUSKIN MOSCOU FALTISCHEK, P.C.  
14 BY: E. CHRISTIAN MURRAY, ESQ.

1           THE CLERK: Civil cause for a status conference, In  
2 Re Air Cargo Shipping Services Antitrust Litigation, docket  
3 number 06 MD 1775.

4           MR. SPECKS: Gary L. Specks, Kaplan Fox, for the  
5 plaintiffs.

6           MR. KAPLAN: Robert N. Kaplan, Kaplan Fox, for  
7 plaintiffs.

8           MR. ARENSEN: Gregory K. Arenson, Kaplan Fox, for  
9 plaintiffs.

10          MR. ASCIOLLA: Gregory S. Asciolla from Labaton  
11 Sucharow for the plaintiffs.

12          MR. SEDRAN: Howard J. Sedran, Levin, Fishbein,  
13 Sedran & Berman for plaintiffs.

14          MR. LANDAU: Brent W. Landau, Hausfeld for  
15 plaintiffs.

16          MR. SHERMAN: William R. Sherman, Latham & Watkins  
17 for defendants.

18          MS. CAIRO: Deana L. Cairo, DLA Piper for  
19 defendants.

20          MR. LOGUE: Kevin C. Logue, Paul Hastings for Korean  
21 Air.

22          THE COURT: Good afternoon.

23                I have your agenda letter that was put together by  
24 plaintiff's counsel, thank you.

25                So is there anything to add from the letter from the

1 defendants' standpoint?

2 MR. SHERMAN: No.

3 THE COURT: I might as well take things down from  
4 the top, the pending motions.

5 I have received the further papers on the European  
6 Commission issue. The decision, I gather there is -- has a  
7 redacted version yet been issued, a non-confidential version?

8 MR. SHERMAN: William Sherman for Singapore Air. My  
9 understanding is that a draft non-confidential version has  
10 been circulated in accordance with fair processes. Their  
11 comments have been made and it's working its way through that  
12 process.

13 I can't tell you anything more than that. I don't  
14 think there is any standard set period of time but it is, as I  
15 understand it, in that stage.

16 THE COURT: The European Commission, I guess the  
17 European Commission did submit a letter and the plaintiffs  
18 responded to it. I did find it curious that the Commission  
19 did not address that Flightterer case, I think that is the name  
20 of it, although I'm not sure I understand Flightterer, I was  
21 reading through it, I'm not sure I understand the  
22 interrelationship between the various parties. It didn't seem  
23 as though the European Commission was a party to that matter  
24 but they submitted argument or they submitted something in the  
25 nature of an amicus to the high court is it?

1           Maybe somebody can explain to me what exactly what  
2 the Flighterer -- what the issue was in Flighterer because  
3 there is obviously helpful language for the plaintiffs.

4           Mr. Landau is it?

5           MR. LANDAU: Yes, your Honor. Brent Landau for the  
6 plaintiffs.

7           The Flighterer case which was decided by the  
8 European Court of Justice which is the highest Court in Europe  
9 actually involved the German Competition Authority, so that  
10 national level version of the European Commission.

11          THE COURT: So it's like, I know it's a rough  
12 analogy but it's like a state versus the United States?

13          MR. LANDAU: Similar, your Honor.

14          THE COURT: I know that is not exactly the way they  
15 set things up over there, and before you go too much further,  
16 the European high court --

17          MR. LANDAU: European Court of Justice.

18          THE COURT: Thank you.

19          Who set that up? Is that a creature of the European  
20 Commission as well?

21          MR. LANDAU: I'm a little bit out of my depth,  
22 your Honor, but I think it is a creature of European Union  
23 Law, the European Commission is the entity in the European  
24 Union that handles its prosecutorial and adjudicatory  
25 functions.

1           So the European Court of Justice is -- one way to  
2 think about it would be the European Commission would be like  
3 the Federal Trade Commission.

4           THE COURT: Is that all it is? I thought it had a  
5 broader reach for some reason but okay.

6           You have given me at least some context.

7           MR. LANDAU: Certainly, your Honor.

8           And so that the issue in the Flighterer case was the  
9 same fundamental issue that we have here which is under what  
10 circumstances can a competition authority in Europe deny  
11 access to its materials to a party who has been injured by a  
12 cartel and is seeking redress.

13           And the Court ruled that there is no basis to simply  
14 deny access because of concerns that the Competition Authority  
15 wants to keep things confidential but there needs to be a  
16 balancing of the competing interest, the confidentiality  
17 versus the interest of the victims.

18           The European Commission has recognized the  
19 Flighterer case as having broader significance as indeed it  
20 does because the same reasoning would apply to the European  
21 Commission's own decisions and whether the confidential  
22 versions of those decisions or other materials that result  
23 from the investigation process should be made available to  
24 injured victims.

25           THE COURT: You said the European Commission has



1 recognized. Where?

2 MR. LANDAU: If you look, your Honor, at our  
3 October 26 letter which is in response to the EC's letter.

4 THE COURT: Yes.

5 MR. LANDAU: One of the exhibits that we attached is  
6 a speech from the European Commission's vice president for  
7 competition policy in which he says that the Court in  
8 Flighterer decided that there was no EU rule that would  
9 justify a refusal to disclose EC related information. And  
10 there has been an application of Flighterer to the European  
11 Commission materials in the National Grid case, which is the  
12 other one that we cited where the parties made arguments about  
13 the applicability of Flighterer and actually the Commission  
14 agreed that so long as there was an appropriate order that the  
15 parties would keep the materials confidential, that they could  
16 be provided.

17 There was also, your Honor, just on Thursday of last  
18 week so we haven't submitted it to you, but another European  
19 decision in the CBC Hydrogen Peroxide versus European  
20 Commission case. And I can hand it up to you if you'd like or  
21 we can file it, but the reason why that is relevant is because  
22 as here and as in some of these other cases, the Commission  
23 argued that its sort of general interest in protecting the  
24 effectiveness of the leniency program outweighed a claimant's  
25 right to have access to the materials. And the Court ruled

1 that that interest wasn't specific enough as asserted to  
2 refuse to provide information to the claimants.

3 So if your Honor would like, I can hand that up to  
4 you or I can file it but it might be useful to you.

5 THE COURT: Have the defendants been provided with a  
6 copy?

7 MR. LANDAU: Not yet. I have a copy for them. I  
8 haven't given it to them. It was just provided on Thursday.

9 THE COURT: Of what significance is it that they are  
10 there dealing with a leniency issue, a leniency, applicant for  
11 a leniency versus the situation here where -- I'm not sure I  
12 know exactly --

13 This judgment of General Court with chamber, is this  
14 another Court?

15 This is obviously a different Court.

16 MR. LANDAU: It is, your Honor.

17 I believe it is a -- it is a lower court than the  
18 European Court of Justice in the European system.

19 THE COURT: And this Court, what was sought what was  
20 the same thing essentially that was being sought in  
21 Flighterer, that is materials submitted by a leniency  
22 applicant?

23 MR. LANDAU: It was in this case one step removed in  
24 that what the claimant sought was basically the index to the  
25 commission's file that identified all the documents that would

1 be in the file.

2 To respond to your question, your Honor, I think  
3 what we are seeking here which is just the final decision of  
4 the commission is a much less sensitive request than is  
5 usually at issue in these cases where the parties may be  
6 seeking intermediate charging documents or the actual leniency  
7 submissions of the defendants.

8 Here we're talking only about the output of that  
9 process, the final decision. The way the European law is  
10 going is that even the more sensitive documents, the  
11 investigatory documents are the ones that are not so shielded  
12 from disclosure as the Commission has argued there and here,  
13 so if anything, this presents an easier case for disclosure  
14 because we are only talking about the final decision which is  
15 itself a document that is binding on all European courts and  
16 we're not asking for any of the investigatory materials, the  
17 hearing transcript, the statement of objections such as for  
18 example where at issue in the Payment Card case before Judge  
19 Gleeson where the plaintiff's already had the final decision  
20 and were seeking the more sensitive intermediate type  
21 documents.

22 THE COURT: So the defendants want to respond?

23 MR. SHERMAN: Yes, your Honor, just briefly.

24 William Sherman again.

25 THE COURT: Let me just pose this to you so you

1 know, I guess it's self-evident by the questions where I'm  
2 going, but it strikes me that Flightterer -- the various more  
3 recent decisions postdate Judge Gleeson's own decision denying  
4 discovery of a similar nature that was sought in another  
5 antitrust case. And so this to some extent I suppose can be  
6 taken as some -- these more recent decisions can be taken as  
7 some indication of what European courts, how important  
8 European courts and the European Union for that matter sees  
9 the confidentiality of the materials that are sought here.

10 MR. SHERMAN: Your Honor, I don't think so.

11 I apologize. I lost my voice over the last couple  
12 of days which most people who spend time with me think is a  
13 good thing.

14 I think that's what the plaintiffs want you to  
15 believe but in fact, I don't know the new case Mr. Landau  
16 handed up but they are overstating Flightterer, they are  
17 overstating the other cases, the British case in an attempt to  
18 make you focus on that and not Judge Gleeson's finding in  
19 Payment Card.

20 In the Flightterer case, the Court simply said in  
21 making this determination, and Mr. Landau sort of said it but  
22 tried to camouflage it, we don't have a blanket rule saying  
23 you can't protect these things. National courts and national  
24 legislators in Europe can address this issue by taking into  
25 account the things that the Commission had said are important.

1 So they said it's important for their leniency program to  
2 protect information. They said it's important that  
3 confidential information and business secrets be protected.  
4 And the decision simply said we won't have a blanket rule,  
5 take that into account legislators and Courts in making those  
6 decisions and weigh those things. National Grid is no  
7 different. National Grid said yes, in this case we should  
8 take that into account. But there the Commission objected to  
9 materials prepared for leniency application. The Court said  
10 the national court must protect business secrets and  
11 confidential information. And it said equally and subject to  
12 the above conditions, that is the two I just mentioned, the  
13 Commission would not object to the disclosure in proceedings  
14 before the English Court concerning the applications of these  
15 articles.

16 So in other words, plaintiffs want you to think that  
17 the Commission said we don't care anymore. That is not the  
18 case at all. They recognized what Flightterer said. They have  
19 taken the position they took in National Grid but here they  
20 have come in and said now in three different letters; we hear  
21 it's important to us, our leniency program is important. If  
22 you disclose this, and they said we're fully aware that it's a  
23 protective order, this is harmful to our leniency program and  
24 it's contrary to our policy because it will reveal business  
25 secrets and confidential information.

1           And just to go back to the question before this  
2 Court, it's not interpreting European law. There may be very  
3 good reasons that the Commission decided that it's going to  
4 take a different position with respect to a private action in  
5 a European Court where it's much more familiar with the  
6 procedures and potential outcome. And I don't know if the  
7 fact that there are treble damages here have anything to do  
8 with a different position if they are taking one but I suggest  
9 to you that the plaintiffs want you to interpret European law  
10 and the decisions of these courts and indeed why the  
11 Commission would take a position one place and not take a  
12 place in another.

13           We submit to you that what the Commission has said  
14 to you is plain. They have made it clear that they have a  
15 concern and they object to what the plaintiffs seek here.

16           Judge Gleeson's decision exactly on point, it's the  
17 comity concern. The fact that it's a statement of objections  
18 versus the final decision is not the question. The question  
19 is do the comity concerns, which are the most concerns in  
20 making this decision, do those outweigh the plaintiff's need  
21 for the information?

22           Here there can't be any question.

23           Plaintiffs at one point said we need this for class  
24 certification. Since they made that argument, they filed  
25 their class certification papers, there is no apparent need --

1 they certainly haven't identified any need for this stuff in  
2 what they put in.

3 In the meantime, the Commission is working its way  
4 through the process and they will get -- I wish I could tell  
5 you this next week, but at some point in the near future they  
6 are going to get the non-confidential version. Between now  
7 and then, all we're doing is going through the class  
8 certification process.

9 So we submit, number 1, they haven't shown any need  
10 and number 2, whatever they want to say about those European  
11 cases, the fact is that the Commission has made it clear that  
12 it objects to the disclosure in this case and that is the  
13 overriding comity concern under Judge Gleeson's decision and a  
14 whole host of others that are to guide the Court's decision.

15 THE COURT: I am convinced that the defendants have  
16 the better of the argument at this point.

17 It may well be that once the non-confidential  
18 version comes out, there may be something you can point to in  
19 there that gives rise to a more specific need that might  
20 justify some disclosure of some aspect but at this point, I  
21 believe the comity concerns should prevent the production of  
22 an unredacted version of the decision.

23 You don't have anything yet I guess but you'll get  
24 something I think relatively soon. But in any event, I see  
25 the comity concerns as outweighing any immediate need.

1           Let me turn to the next issue which is the  
2 attorney/client, the assertion of attorney/client privilege  
3 with respect to some -- actually, I'm not sure exactly. There  
4 are two documents that I was looking at but I'm not sure  
5 whether all or -- I think we had carved out some of those.

6           MR. SHERMAN: Before we get into the substance of  
7 the document, you may recall that we asked that the courtroom  
8 be cleared other than the plaintiff's counsel who are  
9 necessary to this and Singapore counsel. If you want to  
10 discuss this in terms of the detail with respect to any of the  
11 documents, then I request that we do that again.

12           Again, this has been fully submitted. If you have  
13 other questions about the document.

14           THE COURT: I had forgotten that. You are right,  
15 you did submit things ex parte. Perhaps we can table that one  
16 to the end like we did the last time and we don't have to have  
17 everybody stick around.

18           I have to confess that I did not read the transcript  
19 as I had intended to of the deposition of the 30(b)(6) witness  
20 but I am going to have time over the next two weeks to do  
21 precisely that and to issue the rulings on that and I  
22 anticipate that I will do that before the end of the year.

23           So I can't deal with that today. I'm not going to  
24 be able to give you a ruling but I will shortly.

25           We have some new business apparently.



1           And we did get a transfer -- we got some documents  
2 from the Central District of California with respect to I  
3 guess an application that was made there to get access to a  
4 Grand Jury transcript and the Court sent it over to us.

5           I think that the Central District of California  
6 punted on it which is fine.

7           MR. KAPLAN: Under the Douglas Oil case, there is  
8 two parts. The first part, the Grand Jury court which was the  
9 Central District of California had first looked at it and made  
10 a determination for any continued Grand Jury secrecy and  
11 decided whether to transfer it and made some determinations  
12 and there should be a transcript and exhibits.

13           I'm happy that it's here because --

14           THE COURT: I don't think, excuse me for just a  
15 moment, I don't know that we got the transcript yet.

16           THE LAW CLERK: There is no transcript attached or  
17 exhibits. We're in the process of speaking with the clerk's  
18 office here.

19           MR. KAPLAN: We are trying to locate it and we have  
20 been talking to the clerk there and they have been giving us a  
21 transcript form, like ordering AO transcript. So if there is  
22 some way the two clerk's offices could get together on that.  
23 I have also talked to the Justice Department about their  
24 possibly sending it under seal.

25           THE COURT: Jim, you are looking at that?

1 THE CLERK: Yes, and I can speak with Mr. Kaplan  
2 afterwards.

3 MR. KAPLAN: I can give you some contacts.

4 THE CLERK: Absolutely.

5 THE COURT: The question I have is where do I pick  
6 up in this process, because I gather there was some briefing  
7 in the Central District of California as well.

8 MR. KAPLAN: Yes.

9 THE COURT: And maybe you can bring me up to where  
10 that was procedurally and what I am now going to be called  
11 upon to do.

12 MR. KAPLAN: The Justice Department had an in-camera  
13 filing that we haven't seen. Then the plaintiffs and counsel  
14 for Korean Air, counsel for the witness Hedo Lee.

15 THE COURT: That is the witness?

16 MR. KAPLAN: That is the witness.

17 He is I believe a current employee of Korean  
18 Airlines. He is based on the West Coast of the U.S. and they  
19 did filings which we have.

20 So I think the procedure now would be when it  
21 arrives, we set up some kind of briefing schedule in  
22 conjunction with the Justice Department.

23 THE COURT: So the Justice Department opposed  
24 release of the Grand Jury transcripts in the Central District?

25 MR. KAPLAN: Yes and no. They didn't oppose the

1 transfer to this Court. They did file in camera as I  
2 understand it something as to the need for continued Grand  
3 Jury secrecy.

4 THE COURT: Understood.

5 And the Court there had to make what, an initial  
6 determination that they didn't have a specific interest in  
7 this, that they could just pass it on to me or to us over  
8 here?

9 MR. KAPLAN: Under Douglas Oil, there are two courts  
10 involved. This Court determines the need for us to get the  
11 transcript because you are familiar with the litigation, you  
12 know what is going on in this litigation and the posture of  
13 this litigation.

14 The Grand Jury court transfers it, determines to  
15 transfer it and also made findings as to, if you had the  
16 order, the findings as to the continued need for Grand Jury  
17 secrecy.

18 THE COURT: I see. I didn't read the order yet.

19 MR. KAPLAN: That can be presented again here. We  
20 have to show particularized need which we said we think we  
21 have shown. The other people say they think we have not shown  
22 it.

23 So that would be presented here once the transcript  
24 arrives and we set up a briefing schedule.

25 THE COURT: And presumably, the Department of

1 Justice is going to want to weigh in and presumably Korean Air  
2 is going to want to weigh in.

3 MR. KAPLAN: Correct.

4 THE COURT: And that is the only --

5 MR. KAPLAN: The witness.

6 THE COURT: That is true.

7 MR. KAPLAN: I think those are the parties, the  
8 plaintiffs, the Justice Department, Korean Air and the witness  
9 and if we ever find this transcript in the exhibits, we will  
10 try to set up some type of schedule.

11 THE COURT: The only transcript that is being sought  
12 is the transcript of the testimony of this Mr. Lee?

13 MR. KAPLAN: There is another part to it and that is  
14 that we have made a similar motion for another witness Dallas  
15 Sabrenian. He is a former employee of Singapore Air. And we  
16 have made a similar motion in the Northern District of Georgia  
17 and that is pending. The judge there hasn't ruled on that,  
18 has not transferred that transcript.

19 THE COURT: Is that the same guy that is implicated  
20 in the --

21 MR. SHERMAN: Yes, your Honor.

22 MR. KAPLAN: So once this first transcript arrives  
23 and we see where the second one is, then we will try to --

24 THE COURT: Do it all at one time?

25 MR. KAPLAN: Do it all at one time.

1 MR. LOGUE: Kevin Logue for Korean Air.

2 And we agree, a briefing schedule makes sense.

3 I should point out that Mr. Lee had separate counsel  
4 in the California proceeding. I assume he would want to put  
5 something in here as well.

6 THE COURT: Is he a former employee or present?

7 MR. LOGUE: Mr. Lee is a present employee.

8 2 things I want to stress.

9 First of all, as I think maybe was mentioned, the  
10 Court here did find that there was a clear need for continuing  
11 Grand Jury secrecy and based that in part on the showing that  
12 Mr. Lee's counsel made but in part on the in-camera submission  
13 that the Department of Justice made.

14 Obviously, there has been several references here to  
15 trying to get the transcript and the exhibits. I'm not  
16 entirely sure what is being referenced there but I do want to  
17 stress that obviously the Grand Jury testimony and the  
18 Department of Justice in-camera submissions should not be  
19 released to plaintiff's counsel until your Honor has a chance  
20 to look at this.

21 THE COURT: I don't know that it ever should be  
22 released. It was submitted in camera to the Court there. The  
23 Court did not --

24 MR. KAPLAN: We're not asking -- it can be made  
25 later if the Justice Department submits something which may

1 take the position that we should have a chance to see it and  
2 respond to it and of course this whole Grand Jury secrecy  
3 issue changes over time. There was supposed to be a trial in  
4 January. The former employees of Cargo pled so that could be  
5 a changed circumstance.

6 THE COURT: Right.

7 MR. KAPLAN: So when it's ripe, we will address it.  
8 We are not asking at this point for the release.

9 THE COURT: Do you want me to set a schedule now  
10 triggered by the -- I guess there are too many variables. You  
11 don't know when the -- we still have Georgia to deal with. We  
12 don't know when that will come in. We might as well deal with  
13 them all at the same time although I presume it's a different  
14 investigation in Georgia, right?

15 I don't know.

16 MR. KAPLAN: I think that it's all part of the  
17 overall investigation. Apparently there were two different  
18 Grand Juries setting in two different places but it's all part  
19 of the overall investigation but the Justice Department may  
20 have views as to need for secrecy. So I think the first step  
21 is to try to get the Lee transcript and exhibits here. Then  
22 perhaps we can inquire what is going on in Georgia. When they  
23 are both here, we can address it.

24 THE COURT: So I will look to the plaintiffs, who  
25 I'm sure will do this, to coordinate with the parties who want

1 to weigh in on this and submit a briefing schedule whenever  
2 you think the time is right, if we haven't met by that time.

3 MR. KAPLAN: We will do that.

4 THE COURT: We have another Korean Airlines at  
5 issue, Moo-ho Song.

6 MR. KAPLAN: It's actually Moon-ho Song. There was  
7 an N left off.

8 We are going to advise the Court about what is going  
9 on there, but just to refresh you, we filed in March of 2001  
10 an application for letters rogatory which was granted.

11 THE COURT: 2011.

12 MR. KAPLAN: 2011.

13 THE COURT: It's an old case but not that old.

14 MR. KAPLAN: It's getting there.

15 In April we field a motion to have Korean Air  
16 request Moon-ho Song to come to the U.S. because we submitted  
17 a declaration from our Korean counsel who said at the time,  
18 Mr. Sung was not represented by counsel. Korean Air told us  
19 he would represent himself. Our local lawyer called him. He  
20 submitted an affidavit, a declaration saying that Moon-ho Song  
21 had told his that if Korean Air requested him and paid the  
22 way, we would come to the U.S. for a deposition. So made the  
23 application to have Korean Air request him to come to the U.S.

24 In April 2007 Paul Hastings representing Korean Air  
25 filed a declaration from a Seung Jin Choe who said he now

1 represented Mr. Song and Mr. Song didn't want to come to the  
2 U.S.

3 Your Honor, we appeared before your Honor on May 3.  
4 Your Honor said this was very strange that suddenly he had an  
5 attorney after he had made this application. And you directed  
6 Korean Air to send a letter to Mr. Song requesting him to come  
7 to the U.S. saying plaintiff would pay his way.

8 On May 17, Korean Air filed that letter. We have  
9 never received a written response although Korean Air has told  
10 us orally that he says no, he doesn't want to come, but we  
11 would like you to ask Korean Air to please give us a written  
12 response to the letter they sent which letter they filed May  
13 17.

14 THE COURT: I'm not sure I understand what you mean.  
15 You want to make some sort of filing that says, or a  
16 statement, some statement saying that they have heard from  
17 Mr. Choe, did you say?

18 MR. KAPLAN: A letter was sent to Mr. Song by Korean  
19 Air, copied to his lawyer.

20 THE COURT: I see.

21 MR. KAPLAN: And we have never received a written  
22 response.

23 If they have gotten a response, it seems to me, in  
24 writing they should tell us what the response is, whether they  
25 got a letter back, so we request that.



1           Just to bring it up to date, the court in Korea  
2 scheduled an examination of Mr. Song for today, 4:30 Korean  
3 time, which of course they are 14 hours ahead.

4           THE COURT: Now I am really lost.

5           So somehow you compelled his testimony there  
6 pursuant to the letters rogatory?

7           MR. KAPLAN: Yes. Taken from March 2011, it has  
8 taken -- this is a new procedure. This is the first  
9 deposition under the Hague that ever occurred in Korea.

10          So it's a new procedure but the judge there issued,  
11 I don't know if it's an order or request, for Mr. Song to  
12 appear today and he didn't show up.

13          So the judge has reset it for January 30.  
14 Hopefully, he will show up. I believe the procedure is the  
15 judge said if he doesn't show up he is either going to have  
16 him arrested or fined or something.

17          So hopefully he will show up but it would be a lot  
18 easier if they would bring Mr. Song over here as when our  
19 lawyer first spoke to him, he said he would do if requested by  
20 Korean Air and they paid his way.

21          So we would like something in writing about what  
22 kind of response they got to the letter.

23          THE COURT: Mr. Logue.

24          MR. LOGUE: Logue, L-O-G-U-E, your Honor.

25          First of all, this is the first I'm hearing about

1 this request with respect to what happened back in the spring,  
2 your Honor.

3 I would submit that that motion isn't properly tee'd  
4 up.

5 We did comply with the Court's directive back in the  
6 spring. We did send a letter. And as is apparent, Mr. Song  
7 did not come to the United States. They did pursue their  
8 deposition and apparently got the judge to order the  
9 deposition.

10 We don't represent this individual. This is a  
11 former employee. As you know, at the advice of court, he does  
12 have separate counsel. We recently again last week gave them  
13 the contact information and in fact we understand that their  
14 Korean counsel has been in contact with this lawyer.

15 So --

16 THE COURT: With the lawyer for Mr. Song?

17 MR. LOGUE: For Mr. Song, right.

18 THE COURT: I don't think there is any motion  
19 pending.

20 Mr. Kaplan just wanted to know whether you had  
21 received anything in writing or orally from Mr. Song saying he  
22 is not going to appear.

23 MR. LOGUE: To be perfectly candid, your Honor,  
24 because this happened back in the spring, I don't remember how  
25 specifically it was communicated but I believe it was an oral

1 communication from his counsel. But I would hesitate to  
2 represent to that definitively because it's been so long and  
3 again, they gave us no notice that they were raising this  
4 issue today.

5 THE COURT: Is there any problem with you giving  
6 them something telling them how you found out?

7 MR. LOGUE: I can certainly inquire but I am not  
8 prepared to commit to giving them something in writing because  
9 I don't know what we got, if it came through our client or how  
10 we know the information.

11 I can look at it and respond in some fashion and if  
12 they think motion practice is in order, they can pursue it but  
13 I would submit that today there is no properly filed motion or  
14 there is no meet and confer application.

15 THE COURT: It just doesn't seem to me that we have  
16 to go to all that kind of extra effort. It's a simple thing.  
17 Did you find out and did he give you something in writing? If  
18 so, if you think it's privileged, although I can't imagine why  
19 it would be, you can say we got something in writing but I  
20 think it's privileged or you can tell me no if you didn't, you  
21 can say no, we didn't.

22 Let them know in a couple of weeks. After New  
23 Years, you should let them know and you should be able to find  
24 out between now and then whether you did get something in  
25 writing. If you did, give them a copy of it. If you didn't,

1 tell them; and if you think something is privileged in there,  
2 you can assert that.

3 So let's do that by January 9th.

4 MR. LOGUE: Thank you, your Honor.

5 THE COURT: What is the next item?

6 MR. KAPLAN: This is just the schedule. This is  
7 in --

8 THE COURT: You have already made a class  
9 certification motion?

10 MR. KAPLAN: We have made our class certification  
11 motion. They have deposed five of the plaintiffs and they are  
12 going to address that. That is item five.

13 THE COURT: Yes.

14 MR. KAPLAN: They have requested the deposition of  
15 one of our experts and we are trying to get a date for that  
16 and these are the dates. So we don't file our reply brief  
17 until May 25 and you can see the schedule there.

18 THE COURT: All right.

19 Anything about that that needs adjustment?

20 MR. SHERMAN: Thank you for asking that, your Honor.  
21 William Sherman for defendants.

22 Nothing to formally ask the Court to do today but  
23 since it's on the agenda, we thought we should inform the  
24 Court that it's conceivable at this point that we will be  
25 asking for an extension for our papers.

1           We are working hard but as often happens in these  
2 cases, we didn't get all the backup materials from the  
3 plaintiffs' expert when they filed their reports.

4           I have to say Mr. Arenson and Mr. Landau have been  
5 very responsive to our requests and have provided additional  
6 information. The fact is that we are still getting it.

7           There was some data from a couple of the defendant  
8 carriers that the plaintiffs experts used it turned out we did  
9 not have. We had to go and get that. And one of the  
10 plaintiffs has just now in the last week or so produced more  
11 documents.

12           Again, this is not to say at this point that we  
13 think we need an extension but just to sort of preview it for  
14 the Court.

15           As you may recall, the plaintiffs had several  
16 extensions in filing their papers and it is possible, I guess  
17 I wouldn't say likely now, but possible that the defendants  
18 will at some point after the new year be asking for an  
19 extension of time for us to put in our papers.

20           MR. KAPLAN: We were going to say we thought this  
21 schedule was very attenuated. We called when we presented the  
22 first version of it and you said that is an awful long time  
23 for defendants to put in their opposition papers.

24           We would hope that at the very least, the schedule  
25 is kept here because the case will be six years old in

1 February and under the schedule, we don't start taking  
2 depositions again until June and we have a lot more  
3 depositions to take.

4 So we hope we can stick with this.

5 MR. SHERMAN: We hope so too, your Honor, but I  
6 didn't bring the list of extensions the plaintiffs put in  
7 their initial papers but I'm happy to bring that to the Court  
8 if and when we make our request. We are working for that date  
9 but just as a preview, we do have obstacles.

10 THE COURT: I don't want to make any preliminary  
11 ruling although I think Mr. Kaplan is right. There was a five  
12 month period. Now, I'm sure that was set up because it  
13 contemplated there would be expert discovery going on during  
14 that process. And hopefully, that won't slow things down but  
15 it does seem like a long time and if you want extensions, the  
16 mere fact that the plaintiffs got extensions is not to me a  
17 compelling factor. It's what occurred after they filed their  
18 papers that wasn't anticipated that introduced delays to make  
19 it difficult if not impossible for you for meet the deadline.

20 MR. SHERMAN: Understood, your Honor, and my  
21 argument isn't that because they get an extension, we should  
22 necessarily. But they got their extensions, at least asked  
23 for them in part because they thought they weren't ready to  
24 file their papers because they felt there was still discovery  
25 issues or data issues that they were trying to resolve. That

1 is exactly our position.

2 THE COURT: So I don't have to make any decisions  
3 right now and won't, but apparently as part of this process,  
4 there are depositions of class representatives that are  
5 underway, are about to get under way.

6 There are instructions not to answer, so I'm not  
7 sure I know exactly what that means.

8 MR. KAPLAN: There are six class representatives.  
9 Depositions of five of them have been taken. There is one  
10 more that -- it was I believe it was Emirates' counsel was  
11 supposed to take the deposition of a plaintiff but we settled  
12 with Emirates, filed the papers last week. So that has been  
13 put off to give new defendants' counsel -- I don't know who is  
14 doing it but if we settle with that one too --

15 THE COURT: There is a benefit to having this  
16 process lengthen out.

17 MR. KAPLAN: But in any event, they had some issues  
18 in a couple of the depositions, I believe.

19 THE COURT: Okay.

20 MS. CAIRO: Good afternoon, your Honor. Deana Cairo  
21 for Cathay Pacific Airways, Ltd.

22 As Mr. Kaplan mentioned, we have done five of the  
23 six plaintiffs' depositions and at two of the deposition,  
24 plaintiffs SAT and FTS, there were instructions not to answer.  
25 They were defended by Mr. Landau and Mr. Specks respectively

1 and the instructions not to answer were based on relevance.  
2 So Mr. Mauro who represents Korean Airlines and took the  
3 deposition of FTS and I who took the deposition of SAT have  
4 conferred with Mr. Landau and Mr. Specks and we also had an  
5 extensive colloquy on the record during the deposition about  
6 the instruction based on relevance and we feel that we are at  
7 an impasse and just wanted to ask your Honor to set up a  
8 briefing schedule for a motion to compel that we plan on  
9 filing shortly after the new year so that we can have it heard  
10 fairly early on because as your Honor pointed out, we do need  
11 to file our opposition to class certification and these issues  
12 directly bear on our opposition to class certification.

13 THE COURT: Let me ask the plaintiffs; if you are  
14 sole objection is relevance --

15 MR. LANDAU: It's not.

16 THE COURT: -- I'm not going to pay attention to  
17 that argument.

18 MR. LANDAU: I wouldn't make that argument. That is  
19 not what the instructions were based on and we can set it out  
20 in more detail in our briefs. The instructions were based on  
21 a prior order of this Court and an agreement that we had with  
22 the defendants about questions that they wouldn't go into at  
23 the deposition. It has to do with downstream discovery. We  
24 had your Honor's order from a year ago that downstream  
25 information wasn't discoverable.



1           When we got the defendants' deposition notices, we  
2 met and conferred with them and we said theses are pretty  
3 broad, it looks like they get into downstream information.  
4 They said don't worry, we are not going to ask any questions  
5 about downstream information.

6           THE COURT: So I guess it is a species of relevance  
7 but you are resting on the prior ruling of the Court.

8           MR. LANDAU: And their agreement that they weren't  
9 going to do exactly that.

10          THE COURT: So propose a schedule.

11          What do you want to do?

12          MS. CAIRO: We propose that we file our brief on  
13 January 4.

14          THE COURT: Is it going to be a big brief?

15          MS. CAIRO: No, your Honor. Actually we had  
16 asked -- Mr. Mauro had asked Mr. Landau and Mr. Specks if we  
17 could file a six page brief because it involves two  
18 depositions and they have not indicated to us yet.

19          THE COURT: You guys talked about it, you know what  
20 the arguments are so you should be able to anticipate each  
21 other's arguments.

22          So I'll take six pages from you and six pages from  
23 you, single spaced.

24          It ought to be enough for each side, right?

25          MR. LANDAU: Probably too much.

1 THE COURT: I'm glad to hear.

2 MS. CAIRO: We won't use the six pages if we don't  
3 need them.

4 THE COURT: What date did you want to file?

5 MS. CAIRO: January 4th.

6 THE COURT: How much time do you need?

7 MR. LANDAU: I'd like to say two weeks, your Honor.

8 THE COURT: 2 weeks is fine, January 14.

9 But you know what is going to happen. This may be  
10 used to extend that March 23rd deadline for them to file.

11 MR. LANDAU: Only if you agree with them, your  
12 Honor.

13 THE COURT: 2 weeks is not over-long and so we'll do  
14 that.

15 MS. CAIRO: Can we have a date as well to have  
16 argument on it. The status conference might be too long.

17 THE COURT: I'll set a date for argument but subject  
18 to being canceled if I don't think it's necessary.

19 MS. CAIRO: Thank you.

20 THE COURT: Let me do that right now because I think  
21 that brings us to the end of the agenda except for the things  
22 that you want to take up ex parte.

23 We also have a motion that was -- I think it may  
24 have been withdrawn but we weren't sure.

25 There was a proposal to have interrogatories and

1 consolidate the interrogatories. This goes back a few months.

2 MR. SEDRAN: Your Honor, that's still on hold.

3 THE COURT: We are going to mark it withdrawn  
4 without prejudice just so it's not lingering around on the  
5 docket.

6 MR. SEDRAN: That is fine, your Honor.

7 THE COURT: Is there anything else that we need to  
8 discuss as a group other than scheduling perhaps the next  
9 conference?

10 (No verbal response.)

11 (Pause.)

12 THE COURT: Well, I could see you on January 20th at  
13 11:00 for argument.

14 MR. SPECKS: Your Honor, I hate to say it but I'm  
15 going to be on vacation out of the country. I don't get back  
16 until the 24th and this does concern my client.

17 THE COURT: Here is a good date, January 26.

18 MR. SPECKS: That is fine, your Honor. I appreciate  
19 it.

20 MR. LANDAU: That is fine with me also.

21 THE COURT: 11:00 a.m. on that date. How is that?

22 MR. SPECKS: That is fine.

23 THE COURT: Okay.

24 MR. KAPLAN: If we have other things, I guess we  
25 can --

1 THE COURT: Whoever wants to attend can attend. The  
2 only ones who have to attend -- I guess it's pretty much all  
3 defendants and plaintiffs.

4 MR. SHERMAN: I don't need to be here for the  
5 argument if that was a case management or status conference.

6 I'm actually not able to come in but if it's  
7 strictly argument, it's irrelevant if I'm here.

8 THE COURT: Let's do it this way.

9 Unfortunately, that is the only hole that I have. I  
10 don't want to put it off too much beyond that because this  
11 needs to be done and decided relatively early.

12 I'll schedule it for argument. If there is  
13 something that -- I don't think it would be anything  
14 substantive. It may be something, who knows what happens with  
15 this -- the Grand Jury business.

16 If it turns out that it's just a matter of  
17 scheduling something for that, we will do that but we won't do  
18 anything substantive.

19 MR. SHERMAN: So 11:00 a.m. on the 26th?

20 THE COURT: Yes.

21 In terms of case management, I should probably  
22 schedule something 90 days from now or so, something like  
23 that, mid-March, earlier, later.

24 What do you think?

25 MR. KAPLAN: Maybe early March, and if we don't need

1 it, we will cancel it.

2 THE COURT: I do have time in the first week of  
3 March, on the sixth, seventh or eighth. The eighth is Purim.  
4 I don't know if that matters but on the seventh.

5 MR. SHERMAN: The sixth.

6 THE COURT: Tuesday the sixth.

7 Morning or afternoon?

8 I have all day.

9 MR. KAPLAN: I usually prefer the afternoon for  
10 people coming from out of town.

11 THE COURT: So 2:30 on March 6th.

12 So if that is all for the group as a whole, we are  
13 adjourned and we'll take up once the room is cleared the  
14 attorney/client privilege matter regarding Singapore Air.

15 (Matter concluded.)  
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